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Supreme Court of the United States

OCTOBER TERM, 1966

No. 694

A.T. DESMEDT, President, American Export Isbrandtsen Lines, Inc., AMERICAN EXPORT LINES, *et al.*,
Petitioners,

v.

FEDERAL MARITIME COMMISSION,
Respondent,

LUDLOW CORPORATION,
Intervenor-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, A.T. DeSmedt, President, American Export Isbrandtsen Lines, Inc., *et al.*, herein respectfully pray that a Writ of Certiorari issue to the United States Court of Appeals for the Second Circuit to review a decree of that court entered in the above-entitled matter on August 29, 1966.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit (not yet reported) is annexed to this Petition as Appendix A. It affirmed an order of the United States

District Court for the Southern District of New York wherein the District Court, Ryan, Chief Judge, in an opinion reported at 249 F. Supp. 496 (1966) and annexed to this Petition as Appendix B, ordered enforcement of subpoenas *duces tecum* issued by a Federal Maritime Commission Hearing Examiner and directed to each of the Petitioners. The successive opinions of the Federal Maritime Commission Hearing Examiner approving the two applications which resulted in issuance of the subpoenas involved herein appear in the Record (R. 47a-54a, 64a-67a)* certified by the court below and filed with this Petition in accordance with Rule 21 of the rules of this Court.

Jurisdiction

The jurisdiction of this Court is invoked under section 1254(1) of the Judicial Code, 62 Stat. 9288, 28 U.S.C. § 1254(1). This Petition is timely, the decree of the court below having been entered on August 29, 1966.

Questions Presented

I

Does section 27 of the Shipping Act of 1916, which authorizes the issuance of subpoenas only in connection with investigations of "alleged violations" of that Act, implicitly or explicitly sanction the issuance of subpoenas in conjunction with an investigation of Petitioners' filed tariff rates which are merely alleged to be "detrimental to the commerce of the United States" and "contrary to the public interest" in "violation" of sections 14b, 15, and 18(b)(5) of the Shipping Act?

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* Throughout, Record citations appear as "(R.)"; references to the Appendices to this Petition appear as "(A.)".

II

Does section 27 of the Shipping Act of 1916 empower the Federal Maritime Commission to subpoena documents from wherever in the world they may be located despite the prescriptive Congressional limitation in section 27 that documents can be ordered to be produced only "from any place in the United States"?

Statutes Involved

Sections 14b, 15, 18, 21, 22, and 27 of the Shipping Act of 1916, as amended, 46 U.S.C. §§ 813a, 814, 817, 820, 821, and 826, are set forth in Appendix C, which is annexed hereto.

Statement of the Case

The members of the Calcutta, East Coast of India and East Pakistan/U. S. A. Conference are common carriers by water engaged in the transportation of commodities from East Coast of India and East Pakistan Ports to United States Atlantic and Gulf of Mexico Ports. The Conference was organized under, and operates pursuant to, Conference Agreement No. 8650 which was filed with the Federal Maritime Commission for approval prior to effectuation in conformity with section 15 of the Shipping Act of 1916, as amended, 46 U.S.C. § 814, and approved by that agency on March 31, 1964. Acting at all times strictly within the terms of their Conference Agreement, in accordance with the Shipping Act and with the Federal Maritime Commission's General Orders and Rules of Practice and Procedure, the Conference members have adopted common tariffs, rules, and regulations.

On July 11, 1964, the Conference entered into a "dual rate contract" with the Ludlow Corporation, under the terms of which Ludlow would ship all of its jute products

in the subject trade with Conference carriers in return for discount contract rates, fifteen percent less than the ordinary rates available to non-contract shippers. Ludlow's right to void this arrangement, upon notice, is an essential part of this contract. As required by section 14b of the Shipping Act, as amended, 46 U.S.C. § 813a, the Conference has filed its dual rate contract with the Federal Maritime Commission and received written approval thereof.

1. Administrative Proceedings

On July 6, 1965, the Conference filed increased rates on certain jute products with the Federal Maritime Commission as required by the tariff filing provisions of section 18(b) of the Shipping Act, 46 U.S.C. § 817(b), and gave notice to the contractor, Ludlow, that the increased contract rates would become effective October 11, 1965.

Ludlow filed a complaint with the Federal Maritime Commission on August 10, 1965 (R. 25a), citing the Conference and the members thereof as Respondents and alleging that the increased rates are:

> "1. In violation of Section 18(b)(5) of the Shipping Act, 1916, as amended, inasmuch as the named jute product rates are 'so unreasonably high . . . as to be detrimental to the commerce of the United States.';
>
> "2. In violation of Section 15 of the Shipping Act, 1916, as amended, inasmuch as the Respondent's approved Agreement is being so used as 'to operate to the detriment of the commerce of the United States,' and 'to be contrary to the public interest . . .';
>
> "3. In violation of Section 14b of the Shipping Act, 1916, as amended, inasmuch as the Respondent's dual rate agreement is being so used as to be 'detrimental to the commerce of the United States' and 'contrary to the public interest . . .' " (R. 28a-29a).

By way of relief, Ludlow requested the Federal Maritime Commission to issue an order directing the Conference: (a) "to cease and desist from the aforesaid violations" of the Shipping Act, (b) to "establish and put in force and apply in the future, such other rates as the Commission may determine to be lawful", (c) to pay to Ludlow "by way of reparation for the unlawful charges hereinabove described, such sum as the Commission may determine to be proper . . ." (R. 29a). The Conference filed an answer to the Ludlow complaint with the Federal Maritime Commission on August 25, 1965, particularly denying each of the sundry allegations of "violation" of the cited sections and requesting that the complaint and the proceeding be dismissed (R. 32a-35a).

Ludlow filed an application with the Commission on September 27, 1965 for issuance of nine identical subpoenas *duces tecum* directed to the individual Respondents named in the Commission proceeding (R. 36a) who are officers, employees, or agents of the steamship company members of the Conference. The Conference members formally replied to this application on October 6, 1965 and opposed the issuance of the requested subpoenas (R. 42a). Paul D. Page, Jr., the Presiding Examiner in the Commission proceeding, ruled on Ludlow's application on October 18, 1965 and stated he would issue the subpoenas requested (R. 47a). On the following day, October 19, 1965, Examiner Page sought to clarify his ruling and stated that the subpoenas issued pursuant to his ruling of October 18, 1965 would not "require production of documents from any place not in the United States" and that "Application for subpoenas requiring production of documents located elsewhere may be made to the Commission itself". The Conferencee members filed a motion with the Presiding Examiner on October 21, 1965 for leave to appeal the Examiner's ruling to the Commission; the Examiner denied this motion on October 22, 1965. On October 22, 1965, the Presiding Examiner signed the subpoenas requested by Ludlow Corporation (R. 36a).

Ludlow applied to the Commission on October 25, 1965 for the issuance of nine additional and identical subpoenas *duces tecum* covering documents not located in the United States (R. 55a). Your Petitioners moved the Commission on October 26, 1965 for permission to file an interlocutory appeal from the Examiner's rulings on the issuance of the first set of subpoenas and replied to the application for additional subpoenas on November 1, 1965 (R. 58a). In a consolidated ruling served on November 12, 1965, the Commission denied the motion to appeal and granted Ludlow's application for additional subpoenas covering documents located outside the United States (R. 64a). Subsequently, on November 15, 1965, Presiding Examiner Page issued the nine further subpoenas to cover documents "to be produced from wherever they are located". In a letter to the Presiding Examiner on December 2, 1965 counsel for the Conference members advised that "the respondent carriers respectfully decline to comply with the subpoenas issued in this proceeding" primarily because they were invalidly issued in excess of the Commission's authority (R. 68a).

2. The District Court Proceedings

On December 7, 1965, Ludlow Corporation applied for and obtained an order to show cause in the District Court for the Southern District of New York to compel Respondents in the Commission proceeding to comply with the subpoenas issued by the Federal Maritime Commission.[1] On December 8, 1965, the Federal Maritime Commission received permission to intervene in the proceeding commenced by Ludlow Corporation. The Federal Maritime Commission then separately applied for and obtained an order to

[1] A question arose as to Ludlow's standing to seek enforcement of the subpoenas as section 29 of the Shipping Act, 46 U.S.C. § 828, empowers only the Federal Maritime Commission to initiate enforcement proceedings in the District Courts. This question was mooted, however, when Ludlow was granted permission to intervene in the separate enforcement proceeding commenced by the Commission.

show cause in the District Court (R. 1b) under section 29 of the Shipping Act. On December 13, 1965, Ludlow applied for permission to intervene in the separate proceeding initiated by the Commission and permission was granted.

An argument on these several orders was held before the Honorable Frederick V.P. Bryan on December 14, 1965. Owing to Judge Bryan's subsequent illness, the Chief Judge, the Honorable Sylvester J. Ryan, took the matter under advisement on the basis of the papers and legal memoranda filed in the proceeding and filed an opinoin on January 25, 1966 upholding the applications of the Federal Maritime Commission and Ludlow for enforcement of the subpoenas (App. B. 1).

On February 2, 1966, Judge Ryan signed a settlement order submitted by the Commission and made the subpoenas returnable before the Federal Maritime Commission on February 23, 1965 (R. 3a-4a). Your Petitioners filed a notice of appeal on February 4, 1966 (R. 15a). On February 11, 1966, the Conference members filed with the District Court a proposed order for a stay pending appeal and on February 14, 1966, Judge Ryan endorsed the back of said order, granted a stay of the final order until February 21, 1966, and stated that "if any further stay is desired, application may be made to the Court of Appeals". On February 21, 1966, the Court of Appeals stayed enforcement of the District Court's order pending disposition of Respondents' appeal (R. 79b).

Arguments was held before the Court of Appeals on March 31, 1966. On August 29, 1966, the Court of Appeals rendered its decision and entered an order affirming the enforcement order of the District Court (R. 100b). Subsequently, on September 8, 1966, your Petitioners filed a motion with the Court of Appeals for the Second Circuit for a stay of issuance of mandate pending the filing by your

Petitioners of a Petition for a Writ of Certiorari with this Court. On September 19, 1966, the Court of Appeals stayed issuance of its mandate subject to the condition that the stay shall continue until final disposition of the case by the Supreme Court only if within 30 days there is filed with the clerk of the Court of Appeals a certificate of the clerk of the Supreme Court of the United States that the Petition for Certiorari and Record have been filed.

Reasons for Allowance of the Writ

Introduction

The United States is unique among nations in its regulation of international ocean shipping. With enactment of the Shipping Act in 1916, the United States asserted regulatory jurisdiction over the steamship industry which no other nation, before or since, has seen fit to do.[2] Congress, however, recognized beforehand that the nature and the degree of such shipping legislation must be so tailored as not to be a subject of serious concern to foreign nations whose citizens and vessels would be affected. Anticipating that novel, unilateral United States regulation which was too stringent might give rise to international imbroglios and to charges that the United States had assumed supra-

[2] The first major investigation of the shipping industry was undertaken by the British Government's Royal Commission on Shipping Rings which published its report in 1909, Royal Commission on Shipping Rings, *Report*, Cd 4668 (1909). Recommendations of the Commission respecting governmental control were never adopted. See *id.* at 85, 89, 97, 102-04. Commencing in 1912, the House Committee on Merchant Marine and Fisheries, headed by Representative Alexander, conducted a lengthy investigation and issued a comprehensive report in 1914, STAFF OF THE HOUSE COMM. ON MERCHANT MARINE and FISHERIES, REPORT ON STEAMSHIP AGREEMENTS AND AFFILIATIONS, H.R. Doc No. 805, 63d Cong., 2d Sess. (1914) (hereinafter cited as ALEXANDER REPORT).

national policing powers over foreign ocean carriers, Congress drafted and passed legislation which it hoped would be the basis for effective regulation as well as proof positive that the United States was not threatening the territorial and national sovereignty of foreign nations.

Thus, while it has become a truism that the regulatory scheme established in the Shipping Act was patterned after that of the Interstate Commerce Act, *United States Navigation Company* v. *Cunard S.S. Co.*, 284 U.S. 474 (1932), the regulatory powers actually conferred on the fledgling maritime agency amounted to only a modicum of the regulatory authority which Congress had delegated to the Interstate Commerce Commission in the original commerce statute and in a spate of amendments enacted during the two decades following passage of the initial legislation of 1887. See, *e.g.*, the "Hepburn Act", ch. 3591, 34 Stat. 584 (1906).

Drafted by the House Merchant Marine and Fisheries Committee chaired by Chairman Alexander, the bill that became the Shipping Act was—not unnaturally—based on the recommendations of the Alexander Committee respecting interstate and foreign water commerce. H. Rept. No. 659, 64th Cong., 1st Sess. 18-22 (1916). As enacted, the original Shipping Act encompassed the regulation of common carriers by water in United States foreign commerce which was defined in section 1 of the Act, 39 Stat. 728, as amended, 46 U.S.C. § 801, as commerce between the United States and foreign countries. The newly created United States Shipping Board,[3] charged with administering the

[3] The Shipping Board was succeeded in 1933 by the United States Shipping Board Bureau, Exec. Order No. 6166, § 12 (1933), note following 5 U.S.C. §§ 124-32 (1958); in 1936 by the United States Maritime Commission, Merchant Marine Act of 1936, ch. 858, § 201, 49 Stat. 1985; in 1950 by the Federal Maritime Board, Reorg. Plan No. 21 of 1950, 64 Stat. 1273; and in 1961 by the Federal Maritime Commission, Reorg. Plan No. 7 of 1961, 75 Stat. 840.

Act, was given ample powers to ensure that the rates of *interstate water carriers* were just and reasonable, 39 Stat. 735, as amended, 46 U.S.C. § 817, and even the authority by that section to prescribe reasonable maximum rates. The recommendation of the Alexander Committee that the regulatory agency be authorized to determine if the rates of carriers in the foreign commerce were unfair or unreasonably high and to order such rates changed, ALEXANDER REPORT 289, was not enacted into law. Likewise, the Shipping Board's information gathering powers were substantially less than those of the Interstate Commerce Commission. On the advice of the House Merchant Marine and Fisheries Committee, H.Rept. No. 659, *op. cit. supra,* 33, the Shipping Act did not require carriers to maintain uniform systems of accounts, the Shipping Board's subpoena powers were limited to investigations of potential violations of the Act, and the Board was given no authority to compel the production of evidence and testimony from abroad.

In 1961, the Shipping Act was amended by the addition of Section 18(b)(5) to the Act, 75 Stat. 764, 46 U.S.C. § 817(b)(5), to enable the maritime agency to disapprove rates in foreign commerce, but such rates were not declared to be in violation of the Act nor were any monetary penalties attached to disapproval of said rates such as attached to statutorily declared violations of the Act. Proposals made during the 1961 Congressional consideration of the shipping amendments that the regulating agency be equipped with expanded subpoena powers under Section 27 of the Act were rejected by the Congress on the advice of the State Department. S.Rept. No. 860, 87th Cong., 1st Sess. 25 (1961).

The courts below, however, have, in one decisive stroke nullified the checks and balances incorporated in the Shipping Act. Disapproval of properly filed tariff rates under section 18(b)(5) of the Act and disapproval of lawful carrier agreements filed under sections 14b and 15 of the

Shipping Act have been declared to be tantamount to violations of the Shipping Act despite the clear wording of the statute to the contrary. The Commission's subpoena powers can now reach into the remotest corners of the world although the Commission's own previous decisions have held that the subpoena power conferred by Section 27 of the Shipping Act was limited, absolutely, to documents physically located in the United States.

In presuming initially to declare the existence of "violations" of the Shipping Act which defy logic as well as the express wording of the statute and in endowing itself with subpoena power that the Congress has expressly refused it, the Federal Maritime Commission has greatly added to its powers. But as a creature of statute, the agency is bound by the words of its organic statute and the admonition of this Court in *Morgan* v. *United States,* 304 U.S. 1, 22 (1936):

> "The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."

Each of the two questions presented by this case is so fundamental to the future administration of the Shipping Act that their resolution will furnish noted guidelines for the several thousand American-flag and foreign-flag carriers subject to that Act and also to the agency charged with this exercise of federal power.

I

Does potential disapproval of carriers' rates under section 18(b)(5) of the Shipping Act or the disapproval of agreements approved under sections 14b and 15 of the Act involve "violations" which might be the basis for the issuance of subpoenas under section 27?

The relevant provision of section 27 of the Shipping Act, 46 U.S.C. § 826 (App. C. 10), on which issuance of the challenged subpoenas was based, provides as follows:

> "*That for the purpose of investigating alleged violations of this Act,* the Federal Maritime Commission may by subpoena compel the attendance of witnesses and the production of books, papers, documents, and other evidence from any place in the United States at any designated place of hearing." (Emphasis supplied)

As noted above, at page 4, the Ludlow Corporation's complaint alleged the Conference's increased rates were so unreasonably high as to be detrimental to the commerce of the United States, and consequently, in violation of section 18(b)(5) of the Shipping Act. It was further alleged that, as a result of such rates, the Conference's approved organic agreement as well as its dual rate contract with Ludlow were also contrary to the public interest and, therefore, in violation of section 15 and section 14b of the Shipping Act respectively.

In *Federal Maritime Commission* v. *E. G. Caragher,* 243 F.Supp. 136 (1965), *aff'd in part, rev'd in part,* — F.2d — (2d Cir. August 3, 1966), annexed hereto as Appendix D,[4] the

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[4] The *Caragher* case, *supra,* was argued before the Court of Appeals for the Second Circuit before Waterman, Moore and Friendly, Circuit Judges, on March 31, 1966, the day on which Petitioners appeared before that panel to request that the order of the District Court herein be stayed pending appeal (R. 16b). The Court of Appeals granted the stay requested herein and ordered that the instant appeal be argued before the same panel since it involved an issue substantially identical to the main issue presented in the *Caragher* case.

Court of Appeals concluded that section 18(b)(5) was susceptible of violation and that the subpoenas challenged therein might properly be issued under section 18(b)(5) of the Act (App. D. 8). That interpretation, applied in the present case to sections 14b and 15 of the Act as well (App. A. 6), completely disregards the clear words of those sections and substitutes insubstantial inferences for the fine balance of interests created by Congress in section 27 of the Act.

Petitioners' contentions are clear: if a rate has been properly filed under section 18(b)(5), a subsequent finding, after hearing, that it is so unreasonably high or low as to be detrimental to the commerce of the United States can be the basis for disapproving the rate but can *never* be any ground for a finding that the rate was in violation of section 18(b)(5). Only the utilization of such rates subsequent to disapproval is unlawful, as such rates, when disapproved and rejected, would no longer be on file with the Federal Maritime Commission and would be in violation of section 18(b)(4), 46 U.S.C. § 817(b)(4) (App. C. 8), which expressly states that a rejected tariff rate "shall be void and its use unlawful".

The pre-enactment history of section 18(b)(5), which was added to the Shipping Act in 1961, 75 Stat. 764, is persuasive. The bill, H.R. 6775, passed by the House of Representatives contained two provisions relating to "unreasonable" rates. The first, the immediate predecessor of section 18(b)(5), provided that the Commission might disapprove rates so unreasonably high or low as to detrimental to the commerce of the United States, 107 CONG. REC. 9370. The second provision, provided that the reduction of rates to unreasonable levels would be unlawful, *id.*, section 5(b). No version of the second provision was adopted, while a modification of the first provision was enacted as section 18(b)(5). Senator Kefauver's memorandum in support of the Senate version of section 18(b)(5) which was enacted

equally evidences that disapproval of a rate does not constitute a violation of the Act. Thus, comparing his proposal with section 1382 of Title 49, pertaining to the powers of disapproval of the Civil Aeronautics Board, the Senator said of the latter provision: "Moreover, that same section provides that any charges which are not just and reasonable are unlawful—a much sterner standard than the one I am seeking for international shipping cartels." 107 CONG. REC. 18248.

Respecting sections 14b and 15 of the Act (App. C. 1-C. 5), Petitioners also maintain that Ludlow's allegations, *if proven*, would not give rise to findings that those sections had been violated. In sum, sections 14b and 15 provide that dual rate contracts and the types of anti-competitive agreements listed in section 15 must be filed with and approved by the Federal Maritime Commission before they can be utilized with impunity. As stated above, at pages 3 and 4, the Petitioners had followed this course. Likewise, any charges or modifications in the agreements must be filed and approved. In the words of section 14b, "contracts, amendments, and modifications shall be *lawful* only when and as long as permitted . . ." Section 14b and section 15 also state that it shall only be unlawful to use agreements that have not been approved or after approval has been withdrawn; nothing else is in violation of the Act.

The reasoning of the Court of Appeals in *Caragher* centers around its interpretation of section 22 of the Shipping Act, 46 U.S.C. § 821 (App. C. 8). Viewing the investigative function of the Federal Maritime Commission as either "legislative" or "quasi-judicial", that court concluded that any investigation which is quasi-judicial must involve some potential finding that the Shipping Act has been violated or else the Commission would have no authority to proceed with the investigation (App. D. 12). Legislative investigations under either sections 12 or 26 of the Shipping Act, 46 U.S.C. §§ 811, 825, according to the

court in *Caragher*, have as their goals the formulation of recommendations for submission to Congress (App. D. 12). Investigations under section 22, on the other hand, are for the purpose of determining whether some prohibited act has been engaged in or whether some practice, as a rate or agreement, should be disapproved on the basis of "broad normative criteria" (App. D. 12). The court theorized that an investigation under section 15 or section 18(b)(5)—and, presumably, also under section 14b—to determine if certain practices are to be disapproved, if not "for the purposes of investigating alleged violations" of the Act under section 27, would also not be an investigation of "any violation" of the Act under section 22 (App. D. 12). This reasoning, likewise indulged in by the District Court in the instant case (App. B. 6), is fallacious because it interprets section 22 of the Shipping Act to mean that the Federal Maritime Commission can only conduct quasi-judicial investigations under that section when some potential violation of the Act is involved.

Section 22 of the Act, by its terms, provides, in part, as follows:

> "Any person *may* file with the [Federal Maritime Commission] a sworn complaint setting forth any violation of this chapter by a common carrier by water, or other person subject to this chapter, and asking reparation for the injury, if any, caused thereby. . . .
>
> "The [Commission], upon its own motion, *may* in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this chapter." (Emphasis supplied)

The words underscored in the above quotation clearly indicate that section 22 does not limit the Commission's quasi-judicial investigatory powers to complaint proceedings or violation proceedings. The forms of procedure outlined in section 22 are not exclusive; the section permits of other interpretations which do not require that proceedings thereunder involve violations of the Shipping Act.

The analysis of section 22 and section 23 of the Shipping Act contained in the House Merchant Marine and Fisheries Committee Report on H.R. 15455 gives an important clue as to the types of investigations which may come within section 22. The pertinent part of section 23 has not been amended since 1916 and provides: "Orders of the Federal Maritime [Commission] relating to any violation of this chapter shall be made only after a full hearing, and upon a sworn complaint or in proceedings instituted of its own motion." Describing the interrelation of the two sections, the House Report stated:

> "Under section 23 [*i.e.*, section 22] any person may file with the board a sworn complaint setting forth any violation of the act. The board, after due notice to the person complained of, shall investigate the matter and make such order as may be proper, including an award of reparation for any injury resulting from the violation. Similar powers are conferred upon the board to investigate and make orders upon its own initiative, except that awards of reparation may be made only upon complaint. Provision is also made in section 24 [*i.e.*, section 23] that orders relating to a violation may be made only after a full hearing. While this secures to a person alleged to have violated the act a full opportunity to be heard in his own defense, it at the same time leaves free from unnecessary restrictions the action of the board in other matters." H. Rept. No. 659, *op. cit. supra*, 33.

This explanation clearly contemplated investigative proceedings under section 22, and the consequent issuance of orders, which did not require a full hearing. Illustrative of such a section 22 investigation and order would be a proceeding commenced, prior to the amendments of 1961, by the initial filing with the then-Federal Maritime Board of an anticompetitive agreement required to be filed by section 15. The filing of any such arrangement, or the filing of any amendment, modification or change in an ex-

isting agreement would not result in the investigation of "any violation" as the party filing would be merely seeking approval prior to effectuation. In such an event, the regulatory agency would have to determine, among other things, whether the agreement, if approved, would be "unjustly discriminatory or unfair" or would "operate to the detriment of the United States". The intervention of interested parties might convert such a determination into a full adversarial proceeding. Logically, evidence and testimony of witnesses might be necessary to reach a reasoned conclusion, the Board being free under the original section 15 to determine what hearings, if any, were to be held. Yet, no "violation" would be involved and subpoenas could not issue under section 27.

Today, upon the filing of an unapproved section 14b or section 15 agreement, the Commission's quasi-judicial investigative powers become operative although hearings are required as a result of the 1961 amendments. If the parties to such an agreement have not acted thereunder pending Commission approval, no suggestion can be entertained that they may have violated the Shipping Act if, for example, the agreement is not approved because it is found to be "contrary to the public interest". No subpoenas can issue to aid the quasi-judicial process and, yet, this proceeding is certainly a section 22 investigation. If it should be suggested that a proceeding for approval of a section 14b or section 15 agreement is a proceeding under the one or the other of those sections rather than section 22, the answer is that the same would be true of a proceeding to disapprove such an agreement. Section 22 is the only provision of the Act authorizing quasi-judicial inquiries.

Disapproval of approved agreements stands on the same grounds as approval, cancellation, or modification: any agreement may be disapproved but does not give rise to any "violation" if disapproved for any reason stated in the Ludlow complaint.

The Federal Maritime Commission does not itself agree with the Court of Appeals determination that its quasi-judicial investigative powers are limited to violations of the Act.[5] The Federal Maritime Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.61, provide:

> "Proceedings are commenced by the filing of a complaint, or by order of the Commission upon petition or upon its own motion, or by reference by the Commission to the formal docket of a petition for a declaratory order."

The provisions for complaint proceedings presumably relate to statutory violations. The procedural rule governing "petitions", 46 C.F.R. § 502.69, which is annexed hereto as part of Appendix C (App. C. 10), clearly embraces quasi-judicial activity under section 22 of the Act but just as clearly need not involve statutory violations of the statute.

Section 18(b), as well as sections 14b and 15, declare that acts outlawed by those sections render any offender subject to a fine of not more than $1,000 per day for each such violation, and although these sections do not make the monetary penalties apply only to certain kinds of "violations", the Court of Appeals in *Caragher* stated:

> "Congress presumably decided, however, that foreign carriers should be treated with special fairness and thus subjected foreign carriers to penalties only prospectively" (App. D. 17).

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[5] Thus, in testimony before the Joint Economic Committee in 1965, the Chairman of the Federal Maritime Commission indicated the vast bulk of the Commission's activities during the last several years was based on the receipt of "informal complaints" as opposed to "formal complaints" which would involve a violation of the Shipping Act. *Hearings Before The Subcommittee On Federal Procurement And Regulation On Discriminatory Ocean Freight Rates And The Balance of Payments,* Joint Economic Committee, 89th Cong., 1st Sess. 389 (1965).

The basis for such reasoning does not appear in the court's decision or in the statute. Manifestly, if a rate is disapproved because unreasonably high or low, the "violation" such a finding carries with it was in existence during the entire time that the rate was in effect. Thus, if a rate or an agreement, declared to be lawful by the statute because properly filed, can be said to be in violation of the Act at one and the same time, penalties should run from the time the "violations" arose, not from the date of discovery. Clearly, no such horrendous results are possible for the reason that disapproval of properly filed rates and agreements do not, for any purposes, involve violations of the statute and do not authorize the Federal Maritime Commission to issue subpoenas in connection with such proceedings.

II

Does section 27 of the Shipping Act empower the Federal Maritime Commission to subpoena documents "from any place in the world" or is that power restricted to documents that can be produced "from any place in the United States"?

Despite the fact that section 27 has existed unchanged for fifty years, the present case is the first instance in which the maritime agency has issued subpoenas to cover documents located outside the United States. Previous Commission interpretation of section 27 is not in doubt. Thus, in *Iron and Steel Rates, Export-Import,* 3 S.R.R. 472 (January 30, 1964), the Presiding Examiner held: "subpoenas duces tecum will issue for the production of the documents and records requested, subject to the following limitations: . . . (2) *the documents and records shall be limited to those located in the United States, in accordance with section 27 of the 1916 Act*". 3 S.R.R. at 473 (Emphasis supplied) Although this proceeding was concluded on

December 6, 1965 by a decision of the full Commission, 6 S.R.R. 829, the Examiner's ruling of section was not overturned or overruled. Petitioners believed the present case is the first instance in which the Commission has sought to enforce subpoenas covering documents customarily located outside the United States. If the Commission's latest interpretation of this power is to be credited, the authority claimed has always existed but has lain dormant and unutilized for fifty years. This powerful regulatory has apparently evaded detection by the Federal Maritime Commission and its predecessors.

Section 27 authorizes the Federal Maritime Commission to "compel the attendance of witnesses and the production of books, papers, documents, and other evidence from any place in the United States at any place of hearing." The Court of Appeals below disputed Petitioners' contention that the words, "from any place in the United States at any place of hearing", constitute a territorial limitation on the Commission's powers of subpoena and drew a parallel between this provision and the subpoena and discovery powers available in an ordinary civil action in the district court under Rules 45 and 34 of the Federal Rules of Civil Procedure (App. A. 7). The court also thought the present situation analogous to proceedings before a grand jury or before the Internal Revenue Service under section 7602 of the Internal Revenue Code, 26 U.S.C. § 7602 (App. A. 7).

Petitioners submit that the court's illustrations are inapposite. This Court early recognized that the words, "from any place in the United States at any place of hearing", constitute, in section 12 of the Interstate Commerce Act, 49 U.S.C. § 12, a definition of the "territorial sweep" of the Interstate Commerce Commission's subpoena power, *Harriman* v. *Interstate Commerce Commission*, 211 U.S. 407, at 418, 419 (1908). Federal Rules of Civil Procedure 34 and 45 do not contain any comparable territorial restriction such as appears in section 27, nor is a proceed-

ing before a grand jury in any wise like an investigative proceeding before the Federal Maritime Commission. Sections 7602 *et seq.* of the Internal Revenue Code are clearly distinguishable from section 27 in that they contain no words of geographical limitation in any form.

In determining the meaning of the words in question the Court of Appeals below was likewise persuaded by its own decision in *Kerr S.S. Co.* v. *United States,* 284 F.2d 61 (2d Cir. 1960), *appeal dismissed,* 369 U.S. 442 (1962), and by the decision of the Court of Appeals for the District of Columbia in *Montship Lines, Ltd.* v. *Federal Maritime Board,* 295 F.2d 147 (D.C. Cir. 1961), that the Federal Maritime Commission has authority under section 27 to range the world and to require documents to be produced from abroad (App. A. 8 and A. 17). The dissenting opinion of Judge Moore in the Court of Appeals below properly concluded that the majority's reliance on *Kerr* and *Montship* was misplaced since those cases involved the very different provisions of section 21 of the Shipping Act, 46 U.S.C. § 822 (App. C. 8), and *not* section 27 (App. B. 18). Essentially, section 21 empowers the Federal Maritime Commission to require a carrier to file any periodical or special report, or any account, record, rate, or charge or any memorandum of any facts and transactions pertaining to the carrier's business. That section is not circumscribed by a requirement that it be utilized in connection with any statutory Commission duty, investigation, or violation proceeding. That section does not contain any geographical restriction.

The *Kerr* case, *supra,* concerned agency requests under section 21 requests for lists of contracts, copies of such contracts, or, where the contracts were oral, memoranda setting forth the details thereof. The *Montship* case, *supra,* involved a section 21 order that required submission of a list of every contract, agreement, or understanding in effect as of January 1, 1960, copies thereof and certification under oath that the papers submitted were true and complete records of the agreements required.

The only issue concluded in the *Kerr* case was that the order in question was fatally defective "since the reasonableness of the order under review is dependent upon the relevancy of the information demanded, and that cannot be determined in the absence of a statement of purpose." 295 F.2d at 155. As in the *Kerr* case, section 27 was not an issue in *Montship*. In the latter case, the Petitioners suggested that the geographical limitation in section 27 should be read into section 21; the Court thought otherwise. Judge Bazelon raised the question of the applicability of section 27 to foreign documents but properly did not resolve it, as section 27 was not put in issue by the pleadings. Thus, Judge Bazelon merely speculated, rhetorically, "It is questionable whether the Board is in fact powerless under § 27 to subpoena documents outside the territorial confines of the United States", and cited the case of *Securities and Exchange Commission* v. *Minas De Artemisa, S.A.*, 150 F.2d 215 (9th Cir. 1945).

It is submitted the reasons which support enforcement of a section 21 order cannot be so simply transposed and applied to section 27 subpoenas. Indeed, if section 21 and section 27 are *in pari materia*, if the *Kerr* case rationale for requiring the extra-territorial production of documents is also controlling under section 27, then section 27 has no meaning. In that event, the broader provision, section 21, should govern the production of documents in every situation, and section 27 would merely be tautological. But it cannot be presumed that Congress would enact, at the same time and in the same statute, two provisions such as section 21 and section 27 and yet intend that the former provision should absorb the latter. One distinction between the two provisions which renders the *Kerr* and *Montship* divisions inapposite in this proceeding is the fact that section 21 embodies a general reporting requirement which the Commission is free to utilize even for the purpose of collecting documents. Section 27, on the other hand, becomes oper-

ative only when an actual statutory violation of the Act is alleged; as such, it contains a built-in restraint which ensures that the provision will be utilized only when the language of the section is satisfied. Thus, under section 27 the Commission is, ideally, less easily able to compel persons to expose their records to examination.

Despite the fact that the phrases, "from any place in the United States at any place of hearing", have been the usual formula utilized by Congress in its conferral of subpoena powers on administrative agencies since it was made part of section 12 of the Interstate Commerce Act in 1891, these words have been construed in only one case since that time and in that case under very interesting circumstances.

The *De Artemisa* case,[6] *supra,* arose under section 19(b) of the Securities Act of 1933, 15 U.S.C. § 77s(b), which contains a restrictive provision like that in section 27 of the Shipping Act. Section 19(b) empowers the Securities and Exchange Commission to subpoena witnesses and documents during any necessary investigation under that Act and provides that "Such attendance of witnesses and the production of such documentary evidence may be required *from any place in the United States or any territory at any designated places of hearing.*" (Emphasis supplied) The question before the court was whether the italicized words limited the Commission's subpoena power to documents actually located in the United States. Basing its decision on an assumed Congressional design, the court held that the statute was not so limited, stating:

> "The provision is ambiguously worded but we think it was not intended to circumscribe the Com-

[6] It is interesting to note that Mr. Kendall, the Appellee therein, did not enter an appearance in the Court of Appeals proceeding and that when argument was had on the case he was staying in Mexico, a fugitive from justice. The Securities and Exchange Commission assured the Court the border was being watched (R. 82a).

> mission's inquisitorial powers. It appears to be designed to override territorial restrictions which would obtain had Congress prescribed for the Commission the limitations contained in 28 U. S. C. A. § 654, relating to court subpenas. The latter statute, in general, limits the effective service of a subpena to (1) the judicial district, or (2) without the district but within a distance of 100 miles of the place where the subpena is returnable. . . . We are satisfied that § 19(b) was intended broadly to empower the Commission to require the attendance of witnesses or the production of documentary evidence at any designated place of hearing, *provided only that service of the subpena is made within the territorial limits of the United States.*" 150 F.2d at 218. (Emphasis supplied)

As the phrase, "at any designated place of hearing", clearly refers to the place permitted for hearings, the phrase, "from any place in the United States", must be the formula which that Court utilized to evade the "service of process restrictions". Petitioners believe that the court in that case erred in assuming that Congress would have incorporated the District Court services of process rules if it did not adopt the phrase in question. The court's confusion on this point appears to stem from a statement in the Security and Exchange Commission's Brief which conveys the impression that, absent the phrase, "from any place in the United States", the service restrictions would apply automatically (R. 82a). This is incorrect. The Federal Rules do not apply to administrative proceedings unless the regulatory statute so provides.[7] But, in any event, if it is assumed that former section 654, 28 U.S.C., applied to administrative proceedings, the De Artemisa decision would still be wrong. The Securities and Exchange Brief incor-

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[7] When the Federal Rules of Civil Procedure was adopted, the Advisory Committee on Civil Rules provided as to Rule 45 subpoenas: "It does not apply to the enforcement of subpoenas issued by administrative officers and commissions pursuant to statutory authority." See 28 U.S.C. Rule 45.

rectly stated to the Court that Federal Rule 45(a) duplicates its predecessor section 654. It does not, and, consequently, the quotation of section 654 in the Court's opinion is incorrect and was the wrong premises upon which to base the decision. When the Securities Act was enacted in 1933, section 654 provided a one hundred mile limitation *in civil causes* on the service of subpoenas on witnesses who lived outside the district where the court was to sit. As to all other matters, which would include administrative proceedings, section 654 provided that service of subpoenas on witnesses required to testify in one district "may run into any other district". (43 Stat. 1265 [1925], derived from the Act of March 2, 1937, c. 22, § 6, 1 Stat. 335, which was identical to the appropriate provisions of section 654.) Thus, if Congress had not enacted the key phrase, and section 654 applied, service could still be made in any district. Manifestly, the *De Artemisa* court's elaborate reasoning is not valid.

The Court of Appeals below, while reciting the facts surrounding enactment of the 1891 amendment to the Interstate Commerce Act which first contained the words in question (App. A. 11), draws an incorrect conclusion therefrom in an apparent endeavor to save the reasoning of the *De Artemisa* case, namely, that the words, "from any place in the United States at any place of hearing", can serve only one purpose. Examination of the phrases clearly reveals that while the regulatory agencies are free thereunder to conduct proceedings or sessions wherever it wishes, the reach of its powers to compel the attendance of witnesses and the production of documents does not extend beyond the United States.

If it be presumed that Congress gave the Federal Maritime Commission power to compel the production of documents from any place in the world, it would logically follow that Congress would equip the agency with equivalent authority to serve such subpoenas and to secure compliance

therewith. Thus, with reference to court proceedings under Rule 45 of the Rules of Civil Procedure, section 1783 of Title 28 U.S.C. provides for personal service of letters rogatory upon the desired witness by a United States Counsel. Likewise, the Civil Aeronautics Board and the Federal Communications Commission, which the Court of Appeals below indicated have authority like the Federal Maritime Commission to regulate foreign commerce (App. A. 9), have their subpoena powers worded like section 27 but have never attempted to subpoena documents located abroad. Significantly, however, those agencies have been empowered by Congress to take the depositions of witnesses who are located abroad, 49 U.S.C. § 1484 and 47 U.S.C. § 409. No similar authority has been conferred on the Federal Maritime Commission.

The efforts of the then-Federal Maritime Board to expand its subpoena powers in 1961 are illuminating. Thus, according to an amendment to the enforcement provision of Section 27, the agency's authority would have been significantly augmented:

> "For the purpose of conducting hearings when alleged violations of this Act or rule or regulation issued thereunder,* or for the purpose of conducting investigative proceedings prior to the issuance of a complaint, the Board may by subpoena served at any place, within the United States or its Districts, Territories, or possessions compel the attendance of witnesses and the production of any report, record, book, paper or other document or tangible thing, at any designated place of hearing or investigative proceeding.
>
> "Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the Board and the Board or the party on whose request the subpoena was issued may petition the United States district court in the district in which such person resides, or is found, *or the United*

* As in the original.

States District Court for the District of Columbia if he resides in a foreign country, to hold such person in contempt and to punish such person as if he were in contempt of that court." H.Rept. No. 498, 87th Cong., 1st Sess. 29 (1961). (Emphasis supplied)

It is to be noted that the first paragraph quoted would have deleted the phrase, "from any place in the United States". While these proposed additional subpoena powers would have enabled the Board to enforce subpoenas directed to foreign residents, they were not enacted by Congress.

CONCLUSION

For the reasons stated above, the Petitioners respectfully request this Court to issue a Writ of Certiorari to the Court of Appeals and review the novel and all-important questions presented herein.

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